Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2040

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GALEN NELSON - - - - - - - Petitioner

versus

JEFFERSON COUNTY, KENTUCKY,
ADDISON MITCHELL McCONNELL,
EDGAR G. HELM, JR.,
KENNETH GRAHAM, CHARLES TOPP,
DAVID WHALIN, KENNETH LAMPE
and JAMES FUCHS - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PHILIP C. KIMBALL
545 South Shelby Street
Louisville, Kentucky 40202
(502) 587-7086
634-9126
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Statement of the Case	1–5
Argument	5–8
Conclusion	9
Certificate of Service	9

TABLE OF AUTHORITIES

Cases: PAGE

Barnes v. *McDowell*, 848 F. 2d 725 (6th Cir., 1988) .. 7
In Re Potts, 142 F. 2d 883 (6th Cir., 1954) 5, 6, 7–8
In Re Woods, 143 U.S. 202 (1892) 8
Wicker v. *Board of Education*, 826 F. 2d. 442 (6th Cir., 1987) 7

Court Rules:

Rules of the Supreme Court of the United States 13 4
Rules of the Supreme Court of the United States 17.1(a) 9
Kentucky Rule of Civil Procedure 73.02(1) 3
Kentucky Rule of Civil Procedure 77.04(2) 3

No. 88-2040

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GALEN NELSON - - - - - *Petitioner*

v.

JEFFERSON COUNTY, KENTUCKY,
ADDISON MITCHELL MCCONNELL,
EDGAR G. HELM, JR.,
KENNETH GRAHAM, CHARLES TOPP,
DAVID WHALIN, KENNETH LAMPE,
and JAMES FUCHS - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner fails to see any good reason for Respondents' delving into the substantive facts of this case in the detail presented. As we have seen, the Court of Appeals in response to Respondents' interlocutory appeal concluded that, ". . . genuine issues of material fact exist as to whether the appellants [Respondents] committed the acts as alleged by Nelson," the Petitioner (Petitioner's original Brief for this Court, pp. 7, 53a-56a).

Nevertheless, some of the Respondents' factual assertions are so outrageous as to demand correction.

Petitioner did not refuse in writing to, ". . . submit a detailed written statement as to the specifics of how his uniform came to be damaged," (Respondents' Brief for this Court, p. 2) until the Respondents had rejected as inadequate five (5) written descriptions of these events tendered by the Petitioner!

Respondents were unsatisfied with each of these responses for the simple reason that they did not constitute confessions of wrong-doing by the Petitioner.

Petitioner never bragged that his uniform items were unservicable prior to filing a claim for reimbursement (Respondents' Brief, p. 3, footnote 2).

Petitioner never made any sort of serious threat on Respondent Edgar Helm, then Chief of the Jefferson County Police Department (Respondents' Brief, p. 3) and Respondents know this. After Petitioner's alleged threat, Helm assigned him to the department radio room, where he was in daily contact with Helm. Had Helm taken Petitioner's "threat" at all seriously, it hardly seems likely that he would have made such an apparently dangerous re-assignment of him.

Petitioner's performance as a county police officer was not "erratic" and he did not exhibit, ". . . aggressively hostile" attitudes toward anybody as a police officer (Respondents' Brief, p. 4). His county personnel file indicated a competent hardworking officer with a strong desire to help others. After Helm fired Petitioner, he eventually became a police officer for the

City of West Buechel. He has now served in this capacity for approximately three years.

Petitioner's counsel did not "blind-side" Respondents' counsel in the Jefferson Circuit Court, or engage in "ex-parte" conversations with the judge of the division of that Court to which Petitioner's "appeal" of the Merit Board actions was assigned. He notified counsel of his intention to apply for the latest Order of that Court and appeared at the Court's regularly scheduled motion hour to obtain it.

Furthermore, the Order of which the Respondents complain could be set aside at any time or appealed at any time by simply asking the Circuit Clerk to serve notice ot its entry or by filing a waiver of such service. Kentucky Rule of Civil Procedure 77.04(2) states that:

> The date of the notation on the docket of the service of notice or entry, or the date of filing a waiver if prior thereto, shall be the date of entry for the purpose of fixing the running of the time for appeal under Rule 73.02(1).

As Respondents' counsel pointed out in his brief, the Clerk never served him with notice of this Order (Respondents' Brief, pp. 8-9, footnote 11). If he had bothered to check, he would have discovered, not surprisingly, that the notation on the docket of service of notice or entry was missing meaning that the Order was not yet appealable. It is therefore simply untrue that Respondents', ". . . counsel had virtually no remedy in the state court by reason of Kentucky Civil Rule 77.04(a)," (Respondent's Brief, pp. 8-9, footnote 11).

The most outrageous "factual" assertion set forth in the Respondents' brief, however, is the one that:

> The District Court had before it not only the various findings and orders of the Merit Board, but the complete record of the Board's deliberations, including transcripts of the numerous hearings the Board held, both on the procedural and constitutional challenges Petitioner raised, and the substantive merits of Respondent Helm's charges against him.
>
> The Court of Appeals *also* had this record, as well as the District Court's specific findings and rulings, in reaching the opinion affirming the District Court (Respondents' Brief, p. 12, emphasis original).

The record in this case *does not include any transcripts of any Merit Board hearings,* including the Board's hearing "on the merits," of August 29 and 30, 1984.

It is appalling, of course, that the parties to this proceeding cannot agree on what is and is not in the record. The ability of the Petitioner to invoke Rule 13 of this Court, which the Clerk of the Court has informed him may not be used without express order of the Court, would have avoided this situation. In the meantime, the Petitioner is required to prove a negative.

That the transcripts of the Merit Board proceedings are not in the record of this case may be seen from the fact that neither the District Court nor the Court of Appeals ever cited to them in their opinions, that they are nowhere to be found in the Joint Appendix for the

Court of Appeals, that they are nowhere mentioned on the docket sheets of the District Court, and that the Respondents themselves do not cite once to them in their Brief. Of course, it may be argued that this latter fact proves nothing, since the Respondents cite only to the record of this case as it is included in the appendices to the briefs. However, it must be apparent that if there were transcripts in the record of this case to which the Respondents could cite, they would do so.

This is because the Respondents are obviously aware of the importance of the existence of Merit Board transcripts in the record of this case for the application of any sort of preclusion doctrines under Kentucky Law.

ARGUMENT

In the case of *In Re Potts,* 142 F. 2d 883, 889 (6th Circ., 1954), the United States Court of Appeals for the Sixth Circuit, applying Kentucky law, which is, if anything, more hostile to the application of preclusion doctrines now than in the 1950's (Petitioner's Brief, pp. 29a-31a), held that:

> In order to render a judgment conclusive, it must appear *by the record* of the prior suit that the particular matter sought to be precluded was necessarily tried or determined, that is that the judgment could not have been rendered without deciding the matter. . . In order to determine what matter has been decided in the preceeding action, the *entire record* therein is to be considered (emphasis added).

The application of this principle is simple. If there is a record of proceedings in a prior action that the proponents of a preclusion defense claim should bar a later action and the proponents fail to produce it in the later action, then their preclusion defense *must* fail. In the case at bar the Respondents failed to produce the complete record of the proceedings that they claimed led to orders that precluded Petitioner's federal Constitutional lawsuit. Unfortunately, the Courts below failed to apply the principle of *In Re Potts*, just as they failed to apply any of the other principles that make it so difficult to succeed with a plea of preclusion under Kentucky law.

Unfortunately, this situation has turned into a cruel joke. It is doubtful that even the Courts below would have fallen for Respondents' preclusion arguments had the Courts had access to the transcript of the Merit Board proceedings. This is because the transcripts would have conclusively shown that the Board's "observations" concerning Petitioner's Constitutional rights (Petitioner's original Brief, pp. 19a-20a) were purely gratuitous, i. e. made without any reference to any testimony or arguments of counsel whatsoever. Respondents' knowledge of the assistance that the Merit Board transcripts would give Petitioner's opposition to their preclusion claim no doubt accounted for the absence of these transcripts from the record of this case. Unfortunately for Petitioner, he believed that the Courts below would understand basic principles such as that set forth in *In Re Potts, supra,* (Peti-

tioner's original Brief, pp. 28a, 41a-42a, pp. 16-17). Otherwise *he* would have borne the considerable expense of making the transcripts of the Merit Board hearings available to the Courts below!

***** *****

Petitioner is thankful for two aspects of Respondents' brief.

One is its inclusion of the opinion of Sixth Circuit Judge Wellford dissenting from that Court's denial of Petitioner's request for an *en banc* rehearing (Respondents' Brief, pp. 4a-7a). Petitioner did not include this opinion in the appendix to his original Brief for this Court for the simple reason that neither of his attorneys below received a copy of it from the Clerk of the Court of Appeals for the Sixth Circuit or were otherwise aware of the existence of the opinion.

Judge Wellford's opinion supplements the Petitioner's arguments quite ably. Although it relies upon an unpublished opinion to support the proposition that Kentucky administrative agencies generally are not competent to determine Constitutional issues, this point is amply supported by published authority (Petitioner's original Brief, pp. 20-22).

Furthermore, Judge Wellford correctly pointed out that the law in the Sixth Circuit since *Barnes* v. *McDowell*, 848 F. 2d 725 (6th Circ., 1988) and *Wicker* v. *Board of Education*, 826 F. ld 442 (6th Circ., 1987) is that the filing of federal constitutional claims prior to state *court* (much less administrative agency!) adjudi-

cation of arguably similar claims in and of itself defeats preclusion defenses.

It is quite extraordinary for a judge of one of our federal courts to publicly dissent from a denial of *en banc* rehearing, a point that leads to the second aspect of Respondents' brief for which Petitioner is thankful.

This is the Respondents' having unearthed the legal principle that:

> . . . where a particular controversy turns on an application of state law, its resolution by the lower federal courts will not be set aside except upon a showing of palpable and pernicious error,

[Respondents' Brief, p. 12, citing *In Re Woods*, 143 U.S. 202 (1892) and other opinions].

Certainly the error of the Courts below in this case is about as palpable and pernicious as error ever is. It is palpable because it is obvious. No Kentucky court would tolerate or affirm the arguments of Respondent that the federal Courts involved in this case have adopted as if they were holy writ. It is pernicious because it extinguishes *Federal Constitutional* claims that the Courts below had already determined to be worthy of submission to a jury.

CONCLUSION

Once again, the Petitioner believes that this Court should grant his Petition because the Courts below have so far departed from the accepted and usual course of judicial proceedings as to require the intervention of this Court, Rule of the Supreme Court 17.1(a).

Respectfully submitted,

PHILIP C. KIMBALL
545 South Shelby Street
Louisville, Ky. 40202
(502) 587-7086, 634-9126
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of this Brief upon William T. Warner, 621 West Main Street, Louisville, Ky. 40202 and N. Scott Lilly, 1000 Fiscal Court Building, Louisville, Ky. 40202, by mailing the same to them at their respective offices upon this the 24th day of August, 1989.

PHILIP C. KIMBALL
Attorney for Petitioner